89-1115

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

DEWEY SOWDERS, WARDEN, and
ATTORNEY GENERAL OF KENTUCKY,

Petitioners

versus

MAJOR CRANE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FREDERIC J. COWAN
ATTORNEY GENERAL

*JOHN S. GILLIG
ASSISTANT ATTORNEY GENERAL

IAN G. SONEGO
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPELLATE DIVISION
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
(502) 564-7600

COUNSEL FOR PETITIONERS

*Counsel of Record

QUESTIONS PRESENTED

I.

WHETHER THIS COURT'S OPINIONS IN CRANE V. KENTUCKY, 476 U.S. 683 (1986), AND DELAWARE V. VAN ARSDALL, 475 U.S. 673 (1986), ADOPTING HARMLESS ERROR ANALYSIS OF CROSS-EXAMINATION LIMITATIONS, REQUIRED NOT ONLY THAT THE EXCLUDED MATERIAL FACTS BE OTHERWISE PRESENTED TO THE JURY BUT ALSO IN AN "EQUALLY COMPREHENSIBLE" FORM AS IF THE CROSS-EXAMINATION HAD NOT BEEN LIMITED?

II.

WHETHER A HABEAS CORPUS PETITIONER IS REQUIRED BY TITLE 28 U.S.C. SECTION 2254 TO BEAR THE BURDEN OF DEMONSTRATING TO THE FEDERAL REVIEWING COURT THAT CONSTITUTIONAL ERRORS FOUND TO BE HARMLESS BY THE STATE APPELLATE COURT WERE PREJUDICIAL TO THE TRIAL OF HIS CASE?

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dewey Sowders, Warden of the Northpoint Training Center (Prison) for the Commonwealth of Kentucky, and the Attorney General of the Commonwealth of Kentucky petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit granting federal habeas corpus relief to respondent.

JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit filed and decided November 14, 1989. Crane v. Sowders, ___F.2d.___ (No. 89-5289), (Appx. at 55-66), affg., 708 F.Supp. 163 (W.D. Ky., 1988) (Appx. at 44-54). The jurisdiction of the United States District Court was invoked pursuant to Title 28 U.S.C. Section 2254. See Id., 708 F.Supp. at 166 (Appx. at 54). This Court has jurisdiction to review the opinion of the Sixth Circuit Court of Appeals pursuant to Title 28 U.S.C. Section 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (appx. at 55-66) is reported as Crane v Sowders, ___F.2d___ (6th Cir. 1989). The opinion of the United States District Court (appx. at 44-54), affirmed by the Sixth Circuit, is reported as Crane v. Sowders, 708 F.Supp. 163 (W.D.Ky., 1988).

The opinion of the Kentucky Supreme Court in this case is reported. Crane v. Commonwealth, 726

S.W.2d 302 (Ky. 1987)(Appx. at 17-43), cert.den., 484 U.S. 834 (1987); on remand from this Court, Crane v. Kentucky, 476 U.S. 683 (1986)(Appx. at 1-16).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against

him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Title 28 U.S.C. Section 2254 provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on th ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment

of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set fort in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support

the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

This case was previously reviewed by this Court on Crane's petition for certiorari to the Supreme Court of Kentucky. Crane v. Kentucky, 476 U.S. 683 (1986)(appx. at 1-17). In that opinion, the Court concluded that the Kentucky trial court's prohibition of cross-examining the police officers

regarding Crane's confession during the trial unconstitutionally limited Crane's opportunity to impeach the credibility of his confession, but the Court remanded to the Kentucky courts for harmless error analysis under Delaware v. Van Arsdall, 475 U.S. 673 (1986). Id., 476 U.S. at 691 (appx. at 16). Upon remand, the Kentucky Supreme Court found the error to be harmless beyond a reasonable doubt. Crane v. Commonwealth, 726 S.W.2d 302 at 307 (Ky. 1987)(appx. at 34-37). Crane filed a second petition for certiorari in this Court, which was denied. 484 U.S. 834 (1987). Crane then filed a habeas corpus petition in the United States District Court, and that Court ordered a new trial rejecting the Commonwealth's harmless error argument and the analysis of the Kentucky Supreme Court. Crane v. Sowders, 708 F.Supp. 163, at 166-167 (W.D. Ky. 1989)(appx. at 53). The District Court concluded that even if the facts Crane wanted to present to the jury were in fact presented, the presentation of these facts should "have been available to the jury in a form equally comprehensible to that offered by

petitioner." Id., 708 F.Supp. at 166. (Appx. at 53). The Commonwealth appealed. The Sixth Circuit Court of Appeals affirmed and concluded, "[N]o comprehensive picture of the confession setting was presented to the jury." Crane v. Sowders, __ F.2d ___, slip op. at 6 (6th Cir. No. 89-5289, November 14, 1989)(appx. at 64).

The facts of this case have been described by this Court in its previous opinion and need not be repeated in detail here. 474 U.S. at 684-686. (Appx. at 1-7). The principal evidence linking Crane to the murder was his confession. 476 U.S. at 691. (Appx. at 15). But Crane also made pre-arrest statements to Patrick Holder that he robbed a liquor store (TE II 57-58) and to his mother that he robbed the liquor store and shot the victim. (Officer Walter Tangle read Mrs. Crane's pretrial statement to the jury after Mrs. Crane in effect denied any memory of the statement. TE IV 57-58, TE IV 62. See Lawson, The Kentucky Evidence Law Handbook, 2nd Ed., Section 8.05, at pp. 203-206 [Michie 1984], regarding admissibility of the pretrial statement.)

On remand, the Kentucky Supreme Court quoted all of the proffered testimony that Crane wished to introduce and concluded that at most only six factors were contained in the proffered testimony regarding the circumstances of the confession: (1) the exact length of time Crane was questioned; (2) the exact size of the office where the questioning took place; (3) that none of Crane's family was present, although the police did contact one relative by telephone; (4) that Crane was provided with soft drinks in a conversational tone; and (6) that Crane was well treated by the police officers. Id., 726 S.W.2d at 307 (appx. at 34-37).

As the Commonwealth pointed out to the Sixth Circuit the only supposedly relevant testimony that the jury did not hear was the size of the interrogation room. (Brief for respondent/ appellant, Sixth Circuit No. 88-00478, p. 22). Neither the Federal District Court nor the Sixth Circuit found to the contrary. Id., 708 F.Supp. at 166 (appx. at 51-54), ___F.2d___, slip opinion at 5-7 (Appx. at 63-66).

At the trial evidence was introduced showing that Detective Branham was informed of the arrest at 6:15 p.m. He said he took the taped statement beginning at 7:50 p.m. (Detective Branham: TE II 13).[1/] (The foregoing evidence was more favorable to Crane than the actual facts warranted because it initially appeared that Crane might have been questioned during the previous hour and forty five minutes.) In fact, Crane was arrested at 5:52 p.m. No questions were even asked until 6:08 p.m. (Detective Burbrink: TH 8-9). Next, some twenty-five minutes were consumed by processing at the police station (Avowal[2/] testimony of Detective Burbrink: TE V 21). There were some

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1/. Branham also said the confession began at 8:50 p.m. (Detective Branham: TE II 14). That time is undoubtedly a mistake. All witnesses repeatedly said the actual time was 7:50 p.m. (Detective Branham: TH 13, 20-21, TE V 16). Crane was handed over to social workers at 8:45 (TH 11). Any belief by the jury that questioning lasted an extra hour merely strengthens the harmless error argument.

2/. Avowal is Kentucky's term for an offer of proof. Kentucky Civil Rule 43.10.

questions on the way to the Youth Bureau. Another twenty-one minutes were required for paper work at the bureau. Burbrink said he did not finish processing Crane until 6:59 (Detective Burbrink: TH 12). Based on the record, Crane was questioned for less than an hour prior to the taped confession. At trial the jury also heard that Crane wasn't turned over to juvenile authorities until after the confession (Detective Branham: TE II, 37-38) and that they had been giving him some soft drinks (Detective Burbrink: TE II, 45). The jury was told that the taped interview and confession was conducted by: "Myself, Detective Branham, Detective Milburn and also Detective Highland was in and out of the room at the time it was taken." (Detective Burbrink: TE II, 45). The jury heard that George Howard Williams ordered the bottle of T.W. Samuels, that Major Crane came in, said "this is a hold up," and shot the clerk when he turned to get away (Taped statement of George Williams: TE IV, 10). The jury heard that Crane was sixteen (16) at the the time (Id., at 11).

As has been stated, evidence was introduced showing that the only people present during the questioning were Crane and four police officers (Detective Burbrink: TE II 45). Again, the evidence presented to the jury was more favorable than the actual facts. The suppression hearing evidence showed that all but two of the officers came and went during the questioning (Detective Burbrink: TH 18). At least two officers made trips to obtain soft drinks for Crane (Detective Burbrink: TH 12, 26: Avowal Testimony of Detective Burbrink: TE V 22). It is clear that there was no police plot to isolate Crane.

REASONS FOR GRANTING THE WRIT[3/]

The Commonwealth has previously set forth in considerable detail the amount of evidence Crane introduced relating to inconsistencies in the confession. He was granted free reign by the trial court in this regard (Judge Eckart: TE II 6).

3/. All cases cited in this petition were cited in the Commonwealth's brief or reply brief in the Sixth Circuit or in the Sixth Circuit's opinion.

Discrepancies relating to whether money was taken (Detective Branham: TE II 16-33; Marvin L. Devers: IV 54), whether it was possible for Crane to have heard or seen the victim trigger an alarm (Detective Branham: TE II 35, 39-40), the time of the crime (Detective Branham: TE II 24, 31), and the caliber of the murder weapon (Detective Branham: TE II 256-27, 30-31) were all discussed at length. Vigorous defense arguments on these same points were made to the jury (Hon. Frank Jewell: TE VI 19-26).

As has been stated, the complaint made by Crane concerned only one of his three incriminating statements placed in evidence for the jury (Crane's confession to the police, to Patrick Holder: TE II, 57-58, and to his mother Geraldine Crane: TE IV, 62). In addition, there was the statement of George Williams which, like Crane's confession, was verifiably reliable because it mentioned the half-pint of T.W. Samuels (TE IV, 10). Despite the Kentucky trial court's ruling, nearly all the evidence that Crane desired and that he told the jury about in opening was presented to them. He was

permitted to make a broadside attack on the confession based on mistakes in the statement. In view of the weight of the evidence and the amount of evidence produced to support his theory that the one statement at issue should be disregarded, the one facet not presented to the jury (the room's size) was immaterial.

The Sixth Circuit opinion in this case focused primarily upon the question whether the evidence other than the confession was sufficient to sustain Crane's conviction rather than upon the specific facts Crane proffered for admission which were excluded from the jury by the trial court. Id., ___F.2d___, slip op. at 6 (appx. at 63-64). The only precedent for the equally comprehensive rule adopted by the Federal District Court and the Sixth Circuit was this Court's previous opinion in this case. Id., ___F.2d___, slip op. at 6, (appx. at 64-65), citing Crane v. Kentucky, at 690 (appx. at 13-14).

The Sixth Circuit and the Federal District Court failed to specify what provision of Title 28

U.S.C. Section 2254(d) justified their rejection of the fact-finding conducted by the Kentucky Supreme Court. Id., ___F.2d___, slip op. at 1-7 (appx. at 55-66); 708 F.Supp. 163-167 (appx. at 44-54). Rather these courts found error in the harmless error analysis of the Kentucky Supreme Court. But these courts also refused to accept the finding of the Kentucky Supreme Court as to the facts not presented to the jury, contrary to Miller v. Fenton, 474 U.S. 104 at 117 (1985). After quoting from the Kentucky Supreme Court's opinion, the Federal District Court opinion states:

> Respectfully, this Court disagrees. . . . We are not prepared to say that the prosecution can never carry its burden by pointing to an overwhelming weight of unrelated [sic] evidence. . . . [I]t is not sufficient for the Commonwealth to show that the information contained in the excluded avowal testimony was otherwise before the jury; the Commonwealth must also show that it was elsewhere presented, "in an equally comprehensive form." The information that the Commonwealth claims was otherwise available to the jury. . . cannot be said to have been available to the jury in a form equally comprehensible to that offered by petitioner. . . . The

> jury was entitled to observe the demeanor of the officers who described [during the avowal testimony] these and other circumstances of the interrogation they conducted. We cannot say that such an observation could have had no effect on the jurors' assessment of the credibility of the confession.

[Emphasis added.] Id., 708 F.Supp. at 166 (appx. at 51-53).

The Sixth Circuit opinion acknowledged that the defense opening statement explained its theory regarding the unreliability of the confession and that those factual details were admitted during the testimony of the police officers but concluded that the opening statement could not be counted to assemble those facts for the equally "comprehensible" requirement imposed by the District Court. Id., ____F.2d ___, slip op. at 6 (appx. at 64).

The Sixth Circuit opinion does not cite any previous opinion granting relief under the federal habeas corpus statute; every Sixth Circuit opinion cited was a direct appeal from a federal conviction; and no opinions of any other United States Court of Appeals were cited. Id., ___F.2d___, slip op. at 6

(appx. at 63-64). The Sixth Circuit opinion did cite opinions of this Court. Id., ___F.2d___, slip op. at 4-7 (appx. 60-65). Crane v. Kentucky, supra; Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963); Delaware v. Van Arsdall, 475 U.S. 673 (1986).

In Delaware v. Van Arsdall, supra, 475 U.S. at 684, this Court described the test for harmless error analysis of unconstitutional limitations upon cross-examination of a prosecution witness:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

[Emphasis added.]

A key factor upon appellate review, the Court stressed, is "whether the not-fully-impeached evidence [Major Crane's confession] might have affected the reliability of the fact-finding process at trial." (Id.).

Nothing in the opinion requires that the testimony of the witness not fully cross-examined be excluded from the analysis nor was overwhelming evidence of guilt established as the sole or primary factor in the analysis, contrary to the Sixth's opinion in this case. See Id., ___F.2d___, slip op. at 5-6 (appx. at 63-64). In Bourjaily v. United States, 483 U.S. 171 (1987), this Court held the trial court could consider the statement itself in determining the reliability and admissibility of a co-conspirator's statement under the hearsay exception for such statements.

Moreover, the District Court's opinion in this case clearly reflects erroneous analysis since it suggests that any limitation upon cross-examination violates the confrontation clause by limiting the jury's opportunity to observe the

demeanor of the witness. Id., 708 F.Supp. at 166 (appx. at 53). The Sixth Circuit previously reversed the same District Court for a similarly erroneous analysis regarding a criminal defendant's right of cross-examination. Dorsey v. Parke, 872 F.2d 163 (6th Cir. 1989).

In Delaware v. Van Arsdall, supra, this Court rejected Van Arsdall's automatic reversal argument for limitations on cross-examination violating the Confrontation Clause. Crane's argument in the Sixth Circuit was very similar to the rejected argument. The Court summarized the rejected argument (485 U.S. at 683-684):

> Respondent's second argument in support of a per se reversal rule is that the Confrontation Clause error in this case, which like Davis [v. Alaska, 415 U.S. 308 (1974)] involved the exclusion of evidence, is analytically distinct from that in Harrington v. California, which involved the erroneous admission of harmless testimony. Because it is impossible to know how wrongfully excluded evidence would have affected the jury, the argument runs, reversal is mandated.

[Emphasis in Original.]

The Sixth Circuit Court of Appeals rejected a somewhat similar argument in Dorsey v. Parke, 872 F.2d 163 at 167 (6th Cir. 1989) and noted:

> "[O]nce cross-examination reveals sufficient information to appreciate the witnesses' veracity, confrontation demands are satisfied." . . . [A confrontation violation occurs] when the defense is barred from adducing "facts from which jurors, as the sole trier of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." . . . [Or] when the defense is not allowed to "plac[e] before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred [.]"

[Citations omitted. Emphasis in original.] See also, Pennsylvania v. Ritchie, 480 U.S. 39 (1987), holding that defense counsel was not entitled to personally inspect government records to protect right of confrontation/cross-examination; United States v. Viera, 819 F.2d 498 at 501 (5th Cir. 1987), opinion on en banc rehearing, 839 F.2d 1113 at 1114 and 1116 (5th Cir. en banc 1988) [the en banc court unanimously approved the portion of the panel opinion cited] harmless error analysis of cross-examination limitations conducted by reviewing

all evidence presented to the jury to show bias of prosecution witness.

Crane complained in effect that the other evidence cited by the Commonwealth regarding the circumstances of his confession was too greatly dispersed throughout the trial for his defense counsel's ability to present the credibility of the confession to the jury. An elementary principle of Kentucky law is that in closing argument counsel may refer to any matter properly in evidence and any reasonable inferences based on the evidence. Woodford v. Commonwealth, Ky., 376 S.W.2d 526 at 528 (1964); Hunt v. Commonwealth, Ky., 466 S.W.2d 957 at 959 (1971); Nugent v. Commonwealth, Ky., 639 SW.2d 761 at 765 (1982); Baird v. Commonwealth, Ky.App., 709 S.W.2d 458 at 460 (1986).

The trial transcript reflects that Crane's trial counsel did present an effective closing argument describing the factual inconsistencies presented by the confession. (Closing Argument of Frank Jewell, Attorney for Crane, TE VI 17-40).

In United States v. Frady, 456 U.S. 152 at 166-170, a federal habeas corpus attack on a federal conviction, this Court stated:

> We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.
>
> * * * * *
>
> Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

[Emphasis in original.]

In Rose v. Clark, 478 U.S. 570 at 576-577 (1986), cited by Crane in the Sixth Circuit, this court listed cases identifying those matters previously held subject to harmless error analysis, which cases are contrary to earlier opinions declining to apply the harmless error rule. Moreover, this Court stated (478 U.S. at 579):

> Where a reviewing Court can find that the record developed at trial establishes guilt beyond a

> reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

In United States v. Hasting, 461 U.S. 499 at 509 (1983), this Court stated:

> Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]

[Emphasis added.]

The Court's opinion in Rose v. Clark did not declare that the state habeas respondent was required to convince the federal court beyond a reasonable doubt that the error was harmless only by overwhelming evidence of guilt. As noted in Rose v. Clark, supra, 478 U.S. at 578, citing Delaware v. Van Arsdall, supra, 475 U.S. at 681:

> [C]onstitutional errors may be harmless "in terms of their effect on the fact finding process at trial[.]

[Emphasis supplied by the Court in Rose v. Clark.] On remand in Clark v. Rose, 822 F.2d 596 at 600 (6th Cir. 1987), the Sixth Circuit Court concluded that the error was harmless and cited Frady.

In Strickland v. Washington, 466 U.S. 668 at 687 (1984), cited by Crane in the Sixth Circuit, this Court expressly imposed upon the defendant in a criminal case the burden of proving ineffective assistance of counsel including prejudice caused thereby. The thrust of Crane's argument was that the Kentucky trial court's erroneous ruling deprived him of effective assistance of counsel by limiting what his trial counsel could present to the jury to overcome his confession. In Crane's case the Sixth Circuit held that a "reasonable possibility" was sufficient to warrant setting aside Crane's conviction. Id., ___F.2d ___, slip op. at 7 (appx. at 65-66). In Strickland v. Washington, supra, 466 U.S. at 695, the Court stated:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt.

[Emphasis added.]

The express standard used in the Sixth Circuit opinion significantly erodes the reliability of convictions in post-conviction proceedings by

requiring that the State bear the burden of demonstrating that there is no "reasonable possibility that. . . [the trial error] could have contributed to the guilty verdict[.]"[Emphasis added.] Id., ___F.2d___, slip op. at 7 (appx. at 65-66). The Commonwealth contends that the reasonable doubt standard requires a reasonable probability not a mere possibility. As the court stated in Strickland, 466 U.S. at 693, "It is not enough for the defendant [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings."

In Greer v. Miller, 483 U.S. 756 (1987), this Court approved the determination of the Illinois Supreme Court that the constitutional error was harmless and rejected the determination of Seventh Circuit en banc to the contrary. Justice Stevens filed a concurring opinion suggesting that the beyond a reasonable doubt harmless error standard did not always apply to collateral attacks (483 U.S. at 768):

> On direct review, a conviction should be reversed if a defendant

> can demonstrate that a Doyle error occurred at trial, and the state cannot demonstrate that it is harmless beyond a reasonable doubt. But, in typical collateral attacks, such as today's, Doyle errors are not so fundamentally unfair that convictions must be reversed whenever the state cannot bear the heavy burden of proving that the error was harmless beyond a reasonable doubt.

[Emphasis in original.]

Title 28 U.S.C. Section 2254 places the burden of proof upon the habeas corpus petitioner. No provision of that statute requires that the state/respondent bear the burden of proving the absence of prejudice. Subsection (d) concludes, "[T]he burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous."

In Miller v. Fenton, 474 U.S. 104 at 112 (1985), this Court held that federal habeas courts were not bound by state court conclusions regarding federal law but noted:

> [T]he federal habeas court, should, of course, give great weight to the considered conclusions of a coequal state judiciary.

In Cabana v. Bullock, 474 U.S. 376 (1986), this Court held that a state appellate court may make federally required findings even after a habeas petition is filed and noted (474 U.S. at 391), "Considerations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants[.]"

Clearly, the Sixth Circuit Court failed to follow the standard of constitutional analysis adopted by this Court in Delaware v. Van Arsdall. That opinion does not require that the testimony of the witness upon whom cross-examination was limited be excluded in determining prejudice. Instead, the analysis established by this Court focuses on the facts not presented to the jury.

The Sixth Circuit opinion in this case has imposed a new requirement of constitutional law not authorized by this Court's opinion in Delaware v. Van Arsdall and not required by Crane v. Kentucky. Review by this Court would serve to clarify both opinions and the harmless error rule in post-conviction proceedings.

89-1119

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SUPREME COURT OF THE UNITED STATES
October Term, 1989

DEWEY SOWDERS, WARDEN, and
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MAJOR CRANE,

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PETITIONERS' APPENDIX

FREDERIC J. COWAN
ATTORNEY GENERAL

JOHN S. GILLIG
ASSISTANT ATTORNEY GENERAL

IAN G. SONEGO
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPELLATE DIVISION
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
(502) 564-7600

COUNSEL FOR PETITIONERS

A P P E N D I X

UNITED STATES SUPREME COURT
October Term, 1985

CRANE v. KENTUCKY

Opinion of the Court
Decided June 9, 1986

JUSTICE O'CONNOR delivered the opinion of the Court.

Prior to his trial for murder, petitioner moved to suppress his confession. The trial judge conducted a hearing, determined that the confession was voluntary, and denied the motion. At trial, petitioner sought to introduce testimony about the physical and psychological environment in which the confession was obtained. His objective in so doing was to suggest that the statement was unworthy of belief. The trial court ruled that the testimony pertained solely to the issue of voluntariness and was therefore inadmissible. The question presented is whether this ruling deprived petitioner of his rights under the Sixth and Fourteenth Amendments to the Federal Constitution.

I.

On August 7, 1981, a clerk at the Keg Liquor Store in Louisville, Kentucky, was shot to death, apparently during the course of a robbery. A complete absence of identifying physical evidence hampered the initial investigation of the crime. A week later, however, the police arrested petitioner, then 16 years old, for his suspected participation in an unrelated service station holdup. According to police testimony at the suppression hearing, "just out of the clear blue sky," petitioner began to confess to a host of local crimes, including shooting a police officer, robbing a hardware store and robbing several individuals at a bowling alley. App. 4. Their curiosity understandably aroused, the police transferred petitioner to a juvenile detention center to continue the interrogation. After initially denying any involvement in the Keg Liquors shooting, petitioner eventually confessed to that crime as well.

Subsequent to his indictment for murder, petitioner moved to suppress the confession on the

grounds that it had been impermissibly coerced in violation of the Fifth and Fourteenth Amendments to the Federal Constitution. At the ensuing hearing, he testified that he had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession. Several police officers offered a different version of the relevant events. Concluding that there had been "no sweating or coercion of the defendant" and "no overreaching" by the police, the court denied the motion. Id., at 21.

The case proceeded to trial. In his opening statement, the prosecutor stressed that the Commonwealth's case rested almost entirely on petitioner's confession and on the statement of his uncle, who had told the police that he was also present during the holdup and murder. TR 10-14. In response, defense counsel outlined what would prove

to be the principle avenue of defense advanced at trial - that, for a number of reasons, the story petitioner had told the police should not be believed. The confession was rife with inconsistencies counsel argued. For example, petitioner had told the police that the crime was committed during daylight hours and that he had stolen a sum of money from the cash register. In fact, counsel told the jury, the evidence would show that the crime occurred at 10:40 p.m. and that no money at all was missing from the store. Beyond these inconsistencies, counsel suggested, "[t]he very circumstances surrounding the giving of the [confession] are enough to cast doubt on its credibility." Id., at 16. In particular, she continued, evidence bearing on the length of the interrogation and the manner in which it was conducted would show that the statement was unworthy of belief.

In response to defense counsel's opening statement, and before any evidence was presented to the jury, the prosecutor moved in limine to prevent

the defense from introducing any testimony bearing on the circumstances under which the confession was obtained. Such testimony bore only on the "voluntariness" of the confession, the prosecutor urged, a "legal matter" that had already been resolved by the court in its earlier ruling. App. 27. Defense counsel responded that she had no intention of relitigating the issue of voluntariness, but was seeking only to demonstrate that the circumstances of the confession "cas[t] doubt on its validity and its credibility." Ibid. Rejecting this reasoning, the court granted the prosecutor's motion. Although the precise contours of the ruling are somewhat ambiguous, the court expressly held that the defense could inquire into the inconsistencies contained in the confession, but would not be permitted to "develop in front of the jury" any evidence about the duration of the interrogation or the individuals who were in attendance. Id., at 28.

After registering a continuing objection, petitioner invoked a Kentucky procedure under which

he was permitted to develop a record of the evidence he would have put before the jury were it not for the court's evidentiary ruling. That evidence included testimony from two police officers about the size and other physical characteristics of the interrogation room, the length of the interview, and various other details about the taking of the confession. Id., at 45-53.

The jury returned a verdict of guilty, and petitioner was sentenced to 40 years in prison. The sole issue in the ensuing appeal to the Kentucky Supreme Court was whether the exclusion of testimony about the circumstances of the confession violated petitioner's rights under the Sixth and Fourteenth Amendments to the Federal Constitution. Over one dissent, the court rejected the claim and affirmed the conviction and sentence. 690 S.W.2d 753 (1985). The excluded testimony "related solely to voluntariness," the court reasoned. Id., at 754. Although evidence bearing on the credibility of the confession would have been admissible, under established Kentucky procedure a trial court's

pretrial voluntariness determination is conclusive and may not be relitigated at trial. Because the proposed testimony about the circumstances of petitioner's confession pertained only to the voluntariness question, the court held, there was no error in keeping that testimony from the jury.

Because the reasoning of the Kentucky Supreme Court is directly at odds with language in several of this Court's opinions, see e.g., Lego v. Twomey, 404 US. 477, 485-486 (1972), and because it conflicts with decisions of every other state court to have confronted the issue, see, e.g., Beaver v. State, 455 So.2d 253, 256 (Ala. Crim.App. 1984); Palmes v. State, 397 So.2d 648, 653 (Fla. 1981), we grant the petition for certiorari, 474 U.S. 1019 (1985). We now reverse and remand.

II.

The holding below rests on the apparent assumption that evidence bearing on the voluntariness of a confession and evidence bearing on its credibility fall in conceptually distinct and mutually exclusive categories. Once a confession

has been found voluntary, the Supreme Court of Kentucky believed, the evidence that supported that finding may not be presented to the jury for any other purpose. This analysis finds no support in our cases, is premised on a misconception about the role of confessions in a criminal trial, and, under the circumstances of this case, contributed to an evidentiary ruling that deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense. California v. Trombetta, 467 U.S. 479, 485 (1984).

It is by now well established that "certain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." Miller v. Fenton, 474 U.S. 104, 109 (1985). To assure that the fruits of such techniques are never used to secure a conviction, due process also requires "that a jury [not] hear a confession unless and until the trial judge [or some

other independent decision-maker] has determined that it was freely and voluntarily given." Sims v. Georgia, 385 U.S. 538, 543-544 (1967). See generally Jackson v. Denno, 378 U.S. 368 (1964).

In laying down these rules the Court has never questioned that "evidence surrounding the making of a confession bears on its credibility" as well as its voluntariness. Id., at 386, n. 13. As the Court noted in Jackson, because "questions of credibility, whether of a witness or of a confession, are for the jury," the requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial. Ibid. To the same effect was Lego v. Twomey, supra, where the Court stated:

> "Nothing in Jackson [v. Denno] questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as

> free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness." Id., at 485-486.

Thus, as Lego and Jackson make clear, to the extent the Court has addressed the question at all, it has expressly assumed that evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess.

The decisions in both Jackson and Lego, while not framed in the language of constitutional command, reflect the common-sense understanding that the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to solve. See Jackson v. Denno, supra, at 378. But the physical and psychological environment that yielded the confession can also be of substantial relevance to

the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise. . . unworthy of belief." Lego v. Twomey, supra, at 485-486. Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

This simple insight is reflected in a federal statute, 18 U.S.C. §3501(a), the Federal

Rules of Evidence, Fed.Rule Evid. 104(e), and the statutory and decisional law of virtually every State in the Nation. See, e.g., Mont. Code Ann. §46-13-301(5)(1983); Palmes v. State, supra, at 653. We recognize, of course, that under our federal system even a consensus as broad as this one is not inevitably congruent with the dictates of the Constitution. We acknowledge also our traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts. In any given criminal case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of evidence. As we reaffirmed earlier this Term, the Constitution leaves to the judges who must make these decisions "wide latitude" to exclude evidence that is "repetitive. . . , only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). Moreover, we have never questioned the power of States to exclude evidence through the application of evidentiary rules that

themselves serve the interests of fairness and reliability-even if the defendant would prefer to see that evidence admitted. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Nonetheless, without "signal[ing] any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial. Id., at 302-303.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, supra, or in he Compulsory Process or Confrontation clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23 (1967); Davis v. Alaska, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. at 485; cf. Strickland v. Washington, 466 U.S. 668, 684-485 (1984) ("The Constitution guarantees a fair trial

through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. In re Oliver, 333 U.S. 257, 273 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656 (1984). See also Washington v. Texas, supra, at 22-23.

Under these principles, the Kentucky courts erred in foreclosing petitioner's efforts to introduce testimony about the environment in which

he police secured his confession. As both Lego and ackson make clear, evidence about the manner in hich a confession was obtained is often highly elevant to its reliability and credibility. Such vidence was especially relevant in the rather eculiar circumstances of this case. Petitioner's ntire defense was that there was no physical vidence to link him to the crime and that, for a ariety of reasons, his earlier admission of guilt as not to be believed. To support that defense, he ought to paint a picture of a young, uneducated boy ho was kept against his will in a small, windowless oom for a protracted period of time until he onfessed to every unsolved crime in the county, ncluding the one for which he now stands onvicted. We do not, of course, pass on the trength or merits of that defense. We do, however, hink it plain that introducing evidence of the hysical circumstances that yielded the confession as all but indispensable to any chance of its ucceeding. Especially since neither the Supreme ourt of Kentucky in its opinion, nor respondent in

ts argument to this Court, has advanced any ational justification for the wholesale exclusion f this body of potentially exculpatory evidence, he decision below must be reversed.

Respondent contends that any error was armless since the very evidence excluded by the rial court's ruling ultimately came in through ther witnesses. Petitioner concedes, and we agree, hat the erroneous ruling of the trial court is ubject to harmless error analysis. Tr. of Oral rg.; cf. Delaware v. Van Arsdall, supra. We elieve, however, that respondent's harmless error rgument should be directed in the first instance to he state court.

Accordingly, the judgment of the Supreme ourt of Kentucky is reversed, and the case is emanded for proceedings not inconsistent with is pinion.

So ordered.

SUPREME COURT OF KENTUCKY

AJOR CRANE, APPELLANT

s.

OMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT
March 12, 1987

Appellant was convicted of wanton murder ommitted during the course of an attempted obbery. While police were investigating ppellant's involvement in another crime, he onfessed to them that he had committed the murder nd consented to the taping of his confession. At rial appellant pleaded not guilty and objected to he admission in evidence of the confession.

The trial court, after a hearing, ruled hat the confession was voluntary and admitted it in vidence. Appellant then sought to introduce vidence concerning the circumstances under which he confession was obtained. The trial court

refused to admit such evidence, and it was placed in the record by avowal.

On appeal appellant maintained that the circumstances under which his confession was obtained should have been admitted in evidence because they would have some bearing on the credibility of his confession.

The testimony which was not admitted into evidence was placed in the record by avowal. It consisted of the testimony of two police officers as follows:

> "MR. JEWELL: At this time, we would like to put on our avowal evidence, Judge, which we reserved at trial, that being Detective Branham.
>
> "THE COURT: Please take the stand, Detective.
>
> "MR. JEWELL: And we'd also have Detective Burbrink. I'll not ask that he be separated since this is going in by avowal.
>
> "THE COURT: Detective, you remain under the same oath as was previously administered to you. This evidence is offered into the record by way of an avowal, it having been ruled by the court that it is not appropriate to have it brought before the jury."

AVOWAL TESTIMONY OF DETECTIVE WAYNE BRANHAM

"BY MR. JEWELL:

"Q 1 Again, state your name.

"A Detective Wayne Branham.

"Q 2 Detective Branham, you were involved in the taking of the statement from the Defendant, Major Crane, were you not?

"A Yes sir.

"Q 3 On August 14th, did you receive a call from the City Police to meet them somewhere in reference to Major Crane?

"A Yes sir, I did.

"Q 4 About what time was this?

"A I believe it was about 6:50. I didn't bring my report up with me.

"Q 5 And where did you meet the city police at?

"A I first met the city police at the Louisville Police Department Youth Bureau and I proceeded over to the Youth Center.

"Q 6 Did you talk with the Defendant, Major Crane, at the Youth Bureau?

"A No.

"Q 7 Did you talk to him at the Detention Center?

"A Yes sir, I did.

"Q 8 Did you arrive there at approximately 7:00 o'clock?

"A That would probably have been about the correct time, yes sir.

"Q 9 And you then began questioning or talking with Major Crane at that time?

"A Yes sir.

"Q 10 Now you took a waiver of rights at 7:45, correct?

"A Yes sir, I believe so.

"Q 11 And the recorded statement did not begin until 7:50, correct?

"A That is correct.

"Q 12 When you were at the Youth Center with Major Crane, were any of the social workers at the Youth Center present with him during your questioning?

"A During the questioning, no sir.

"Q 13 Was any member of his family present?

"A No sir.

"Q 14 Was anybody present besides Major and the police officers?

"A No sir, there was not.

"Q 15 The room in which you did this questioning at the Youth Center, about how big was it?

"A It is a small office. I'll estimate it at maybe probably 10' X 10' maybe.

"Q 16 And you were present at the questioning?

"A Yes sir.

"Q 17 And Detective Milburn?

"A Yes sir.

"Q 18 Detective Burbrink?

"A Yes sir.

"Q 19 Detective Highland?

"A Yes sir.

"Q 20 And was there any other persons present?

"A I believe Sergeant Cummings was in the room too, with the Louisville Police Department.

"Q 21 And while you all were in this office, did you have the door open or closed?

"A Sir, I don't recall whether it was open.

"Q 22 Does this office have any windows in it?

"A No sir.

"Q 23 And this is the office where you first started talking a little after seen until there statement ended at 8:34, correct?

"A That is correct. That was our office that was given to us there by the workers at the Center.

"Q 24 No worker from the Center stayed in there for the questioning, correct?

"A No sir.

"Q 25 Did you request that one stay in there?

"A No sir.

"Q 26 At any time, did you see Major Crane use the phone to call a family member?

"A No sir.

"Q 27 At any time, did you, yourself, talk to the mother of Major Crane that evening?

"A That evening?

"Q 28 While questioning was going on.

"A No sir.

"Q 29 Say prior to 8:40?

"A No sir.

"MR. JEWELL: I have no further questions.

EXAMINATION OF DETECTIVE BRANHAM
ON AVOWAL BY MR. DAVID STENGEL

"Q 1 Sir, how was Major Crane being treated during the time you were there?

"A He was treated well. I think at one point, we asked him if he wanted a drink. He was seated at a table, as I recall, or a desk-type table.

"Q 2 Did you get him any sort of soft drinks, potato chips, anything like that?

"A I know he was asked. I don't remember whether he requested one. If he did, I am sure he got one but I don't remember.

"Q 3 Would you describe his demeanor at the time?

"A His demeanor was he was calm at the time. It was just a conversation-type situation.

"Q 4 Were you all seated, standing? What was the scene in there? did you all have enough chairs to go around?

"A As I recall, I was seated and I believe there was a couple

of more chairs. I don't remember the exact arrangements. There may have been one or two officers standing.

"Q 5 Had you had any discussion prior to the time you started tape recording that statement?

"A With?

"Q 6 With Crane.

"A I talked to him briefly before but we went right into the recording.

"Q 7 Were any threats, promises, or anything else made to him there at that time?

"A No sir.

"Q 8 Are you aware of attempts to contact his family?

"A I am not aware, no sir. The workers there at the Center may have been attempting to contact them. I don't know.

"Q 9 At one time, he requested that he go to the restroom, is that correct?

"A That is correct.

"Q 10 And did he go?

"A Yes sir, he did.

"Q 11 In your presence, was he abused, threatened or anything else in any way?

"A No sir, he was not.

"MR. STENGEL: Thank you, sir.

"MR. JEWELL: I have no further questions.

"THE COURT: Thank you, you may stand down. Other avowal evidence?

"MR. JEWELL: Detective Burbrink.

"THE COURT: Detective, you remain under the same oath as was previously administered to you."

AVOWAL TESTIMONY OF DETECTIVE DON BURBRINK

EXAMINATION BY MR. JEWELL:

"Q 1 Please state your name for the record, please.

"A Detective Donald Burbrink, Louisville Division of police, Fourth District.

"Q 2 Detective Burbrink, what is the first time you came in contact with Major Crane on August 7th?

"A Approximately 1752 hours, 5:52 in the afternoon.

"Q 3 5:52 p.m.

"A Yes sir.

"Q 4 And you all remained at the substation for awhile after that, did you not?

"A We left the substation at 1825. So by the time we got into the district, it was about 1800 or six o'clock, 6:00 p.m. So we were there approximately 25 minutes or enough time for me to type up a slip.

"Q 5 And then you took him to the Youth Bureau which is in Louisville Police Headquarters, correct?

"A Yes sir.

"Q 6 And how long did you remain there?

"A According to my time, we arrived there at 1838 and we left there at 1859.

"Q 7 Then you proceeded to the Youth Center, correct?

"A Yes sir.

"Q 8 Where upon arrival after you all went into the Youth Center, you all went to a room for questioning, correct?

"A Correct.

"Q 9 And you had called the County to come meet you at the Youth Bureau, correct?

"A Yes sir.

"Q 10 Now when you arrived at the Detention Center, the room that you went to, was down a hall from the admissions area?

"A There is a long desk there in the admission area. There is a doorway there. You come out the door, you go to your left and it is about 10 yards down the hall.

"Q 11 And this room-would you agree with the description we had of about 10' X 10' perhaps?

"A 10' X 10', 12' X 12', something like that, yes sir.

"Q 12 And this room had no windows?

"A That is correct.

"Q 13 And during questioning, I am talking about from this time until the tape recorded statement ended at 8:40, was anybody else allowed in? Did anybody else come into the room besides Major Crane and the police officers?

"A No sir, Detective Highland went back and forth getting Major some soft drinks and potato chips, etc., but nobody else entered, no sir.

"Q 14 No worker, no family member, nobody else?

"A No sir.

"Q 15 And you were aware at this time that Major Crane was 16 years old, correct?

"A Yes sir.

"MR. JEWELL: I have no further questions."

EXAMINATION BY MR. STENGEL:

"Q 1 Sir, did you make any attempts to contact Major Crane's family?

"A Yes sir, I did, several times. When we first picked him on up and brought him to the Fourth District Substation , I tried to call the mother. I talked to an aunt at that time and told her what was going on with his charges, etc., and where he could be found and she said she would contact the mother and bring her to the Detention Center. I told her about what the timing would be. I called back again at 1912 when we first arrived at the Detention Center and there was no answer at home. And at that time, I assumed the mother and aunt were on the way. We left specific instructions with the people at the front desk, if the mother of Major Crane or an aunt or any family member were to come in, to take them back to the room where we were questioning him.

"I called again before the statement started at 1945 and again there was no answer. After the statement, we tried repeatedly to call and finally talking to his grandmother later on.

"Q 2 Do you have alist of the repeated lies there?

"A Yes. Seven attempts of calling from 2043 until 2128.

"Q 3 And you say Detective Highland was coming and going with soft drinks, etc. for Major?

"A Yes.

"Q 4 Did Major express any sort of discomfort or fear or any other negative feelings while you all were talking to him?

"A No sir.

"Q 5 Describe his demeanor and his-well, first, his demeanor.

"A He was calm just like you or I sitting here, just matter of fact about everything.

"Q 6 Could he be described as talkative?

"A Oh, he was definitely talkative.

"Q 7 You talked about a considerable amount of things other than simply this offense, isn't that correct?

"A Yes sir, that is correct.

"Q 8 And that was freely given or apparently freely given from Major to you?

"A Yes sir.

"Q 9 Do you remember any requests that Major made that weren't acted upon or weren't granted?

"A None whatsoever.

"Q 10 Any requests to call home?

"A No sir, never requested to call home or requested to call anybody.

MR. STENGEL: Okay thank you, sir."

REEXAMINATION BY MR. JEWELL:

"Q 1 Detective Burbrink, when you talked to the aunt over the phone, did you tell her that Major was being questioned in regards to a murder charge?

"A He was not being questioned about a murder charge at that time, sir, so we did not have any reason to tell her that.

"Q 2 So as far as you know, at least from yourself, the family did not learn that he was being questioned on a murder charge prior to the statement, correct?

"A That is correct, yes sir.

"MR. JEWELL: I have no further questions

"THE COURT: Will counsel for the Defendant state upon the record again the purpose of this avowal.

"MR. JEWELL: The purpose of the avowal, Judge, was earlier today, the Commonwealth moved by motion in limine that we not be allowed to go into the facts and circumstances surrounding the confession, such as how long the young man was in police custody, the fact that he had nobody there with him, since they felt that was heard at the suppression hearing and should not be heard in open court. we then stated we felt we had a right to ask the police officers those specific questions as it went to both voluntariness and credibility to be given a confession by a 16-year old in police custody at least a couple of hours with no family member present. The Court sustained the Commonwealth's motion, overruling our objection. Therefore, we felt we had to get this evidence in by avowal."

On appeal to this court, no issue was raised as to the ruling of the trial judge as to the voluntariness of the confession. The attack was centered solely on the claim that the excluded evidence was admissible not on the question of the

voluntariness but upon the issue of the credibility of the confession.

We concluded that the length of time of questioning, the number of police officers engaged in the questioning, the size of the room in which the questioning took place, and factors of like import would pertain to the credibility of the confession only to the extent that such factors might indicate coercion, ergo involuntariness, and since voluntariness was not a jury issue, the evidence was properly excluded. We affirmed the judgment.

The United States Supreme Court reversed, holding that the excluded evidence was admissible on the issue of the credibility of the confession. The court held, however, that the error is subject to harmless error analysis and remanded to this court for a determination of that matter. Crane v. Kentucky, 476 U.S. ___, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

In his confession, the appellant made statements which were demonstrably untrue. He said

he used a .357 magnum weapon, but the weapon used in the robbery was a .32 caliber pistol. He said he fled from the premises when the owner activated an alarm which created a lot of noise. In act, the store did not have an alarm system. He said, in his confession, that the robbery occurred in the afternoon during daylight and that $300.00 was taken, when in fact an attempted robbery took place after 10:00 p.m. and no money was reported missing.

These discrepancies might reasonably reflect upon the credibility of the confession, and the defense was allowed to show all these discrepancies. The record further discloses that portions of the excluded testimony came before te jury from other sources.

The jury heard testimony that the appellant was questioned by several police officers. The appellant was present at trial, and the jury could observe his youth and appearance. the approximate time of his arrest and the time the officers commenced taping his statement was before the jury.

In the opening statement to the jury, appellant's counsel claimed the appellant was brought to the detention center for questioning at 7:20 p.m. and was turned over to the custody of the center at 9:00 p.m.

The excluded evidence would have added this additional information from Detectives Burbrink and Branham: that appellant was arrested at 5:50 p.m. and remained at the police substation until 6:25 p.m., just long enough to type up some papers; that appellant was then transported to the youth bureau in Louisville police headquarters, arriving there at 6:38 p.m.; that at 6:59 p.m. he was taken to the detention center where he was met b y county officers; that he was questioned in an office approximately 10' X 10' or 12' X 12' square at the detention center until approximately 7:50 p.m., when a recorded statement was taken which ended at 8:40 p.m.; that no member of his family was present, but officers repeatedly attempted to get in contact with his mother and did get in touch with his aunt and requested the family to come to

the detention center; that nobody entered the office when appellant was questioned except four or five officers; that one of the officers was in and out of the room getting soft drinks and potato chips for appellant; that appellant was seated during the questioning; that he appeared calm; that the questioning was a conversational-type situation; and that appellant was treated well.

An uncle of appellant who was a participant in the robbery gave a statement to the police that appellant attempted the robbery and shot the store clerk. Geraldine Crane, the mother of appellant, in referring to a conversation with her son, stated to the investigating officers, "He said that he robbed, he killed, he shot a man, but he didn't know the man was dead until yesterday." She denied at trial, however, that appellant told her he shot a man.

The test for harmless error is whether there is any reasonable possibility that s sent the error the verdict would have been different. Commonwealth v. McIntosh, Ky., 646 S.W.2d 43 (1983). Because the test is phrased in

terms of "reasonable possibility," an error of constitutional proportions must be shown to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The question here is not whether the jury reached the right result regardless of the error, but whether there is a reasonable possibility that the error might have affected the jury's decision.

This jury had knowledge of the many inconsistencies in appellant's confession, and were aware of appellant's youth and the fact that he had been questioned by four or more police officers at police headquarters. None of this knowledge caused the jury to discredit appellant's confession.

In view of the incriminatory testimony of appellant's uncle and mother, it is inconceivable to us that the jury would have reached any other result in this case had they had the additional testimony concerning the exact length of time appellant was questioned; the exact size of the officer where the questioning took place; that none

of this family was present, although efforts were made to secure their presence; that appellant was provided with soft drinks, etc.; and treated well by the officers.

It is our view that beyond a reasonable doubt there is no reasonable possibility the verdict of the jury would have been different had the erroneous exclusion of evidence not occurred.

The judgment is affirmed.

STEPHENS, C.J., and GANT, VANCE, and WINTERSHEIMER, JJ., concur.

LEIBSON, J., dissents by separate attached opinion in which LAMBERT, J., joins.

STEPHENSON, J., not sitting.

LEIBSON, Justice, dissenting.

Respectfully, I dissent.

I was the lone dissenter when Crane's appeal was originally heard in the Kentucky Supreme Court, and his conviction affirmed. The reason for my dissent was that the trial court had improperly suppressed evidence offered to show circumstances of "intimidation surround the taking of the confession, . . . relevant to its credibility." 690 S.W.2d 753, 755. The trial judge's decision that the confession was not coerced, made when he decided to admit it, did "not preempt the jury's need to consider evidence about coercion in deciding guilt." Id.

The offered evidence, which was heard at the suppression hearing but suppressed at the trial, served multiple purposes, because the same evidence was relevant to both voluntariness and credibility, and thus "should be admitted when offered for the proper purpose." Lawson, Kentucky Evidence Law Handbook, §1.10(A)(2d ed. 1984).

The United States Supreme Court, with a rare showing of unanimity in the decision of a criminal constitutional law question, reversed the Kentucky Supreme Court, applying the same principles and reasoning set out in my previous Dissenting Opinion. See Crane v. Kentucky, 476 U.S. ___, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). As stated in the United States Supreme Court's decision:

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528 [2532], 81 L.Ed.2d 413 (1984); . . . That opportunity would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." At ___, 106 S.Ct. at 2146, 90 L.Ed.2d at 645.

However, rather than remanding this case back to the trial court for a new trial, the United States Supreme Court elected to remand this case

back to the Kentucky Supreme Court for "harmless error analysis." Id. at ____, 106 S.Ct. at 2147, 90 L.Ed.2d at 646. The Court's decision to do this is rather strange when we consider this statement in its opinion:

> "We do, however, think it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of [Crane's defense] succeeding." Id. at ____, 106 S.Ct. at 2147, 90 L.Ed. at 645.

The Commonwealth had contended in the United States Supreme Court that "the very evidence excluded by the trial court's ruling ultimately came in through other witnesses." Id. at ___, 106 S.Ct. at 2147, 90 L.Ed.2d at 646. Rather than examine this contention, the United States Supreme Court remanded this case back to our Court to do so.

Since we are confronted with trial error of constitutional magnitude, "harmless error analysis" puts the burden on the Commonwealth to prove that excluding the evidence was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Considering that the evidence excluded was admittedly critical to the defense, its exclusion could hardly be harmless beyond a reasonable doubt unless the same evidence was elsewhere presented to the jury, and in any equally comprehensible form. Such is not the case.

On the contrary, as presented to the jury the evidence concerning the circumstances surrounding the taking of Crane's confession was partially incomplete, and confusingly presented. Defense counsel had made this point, coercion in the circumstances surrounding the taking of the confession, the principal thrust of his opening statement. After the trial court ordered the evidence suppressed, the jury was left with the impression that the defense was left with as failure of proof. When a jury is told in opening statement what a lawyer expects to prove, and he subsequently fails to prove it, this significantly affects the credibility of his entire case. A.S. Julian, Opening Statements, Ch. 2, §2.03.50 (cum.supp. 1985).

The defense proposed to prove that Crane was a sixteen year old boy who was questioned nearly two hours by five police officers in a small 10' X 10', windowless room in the absence of any family member or social worker. He was questioned about a number of crimes, and a number of things that he stated in his confession as to the present crime were demonstrably untrue. The confession was in error about the type of weapon actually used, about the setting off of an alarm system when there was no alarm system, and about the robbery occurring in daylight hours when in fact it happened at 10:00 p.m. Additionally, in the confession Crane stated that he got $300 in the robbery, when the evidence was that no money was taken.

The evidence related to the boy's age and the circumstances of his questioning, which supposedly renders the suppression of the avowal evidence harmless, came in only tangentially and b;y inference. It omitted details and it fell far short of a complete picture of the circumstances of

the interrogation as the defendant wished to present them.

In summing up the opinion, the majority opines, "[i]n view of the incriminatory testimony of appellant's uncle and mother, it is inconceivable to us that the jury would have reached any other result in this case had they had the additional testimony. . . ." However, the evidence introduced during trial from these witnesses to corroborate Crane's confession was brought out in conflicting testimony with numerous denials.

This in no way suggests that I believe that Crane's confession was coerced, that it lacked credibility, or that Crane is not guilty. But this is not our decision to make. Crane was entitled to present this claim of coercion in as clear and comprehensible a fashion as the law of evidence permits. It is for the jury to pass on its credibility in deciding the question of his guilt. Crane did not get this chance.

I dissent.

LAMBERT, J., joins in this dissent.

UNITED STATES DISTRICT COURT
W.D. KENTUCKY AT LOUISVILLE

March 2, 1989

Major CRANE, Petitioner,

v.

Dewey SOWDERS, Respondent.

Civ. A. No. C88-0478-L(A)

MEMORANDUM OPINION

ALLEN, Senior District Judge.

This 28 U.S.C. Sec. 2254 petition is before the Court following the determination of the Supreme Court of the United States that there was constitutional error in the trial court's exclusion of certain evidence concerning the circumstances surrounding petitioner's confession. Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). The Court remanded to the Commonwealth for a "harmless error" analysis, which was conducted by the Kentucky Supreme Court. In this proceeding, petitioner contends he is incarcerated in violation of his rights under the United States

Constitution as a result of the determination of the Kentucky Supreme Court that the error was harmless beyond a reasonable doubt. Crane v. Commonwealth, 726 S.W.2d 302 (1987).

Mr. Crane was charged with the murder of a liquor store attendant in connection with an attempted robbery. There was no physical evidence linking him to the crime. He did, however, give the police a statement in which he claimed that he and his uncle had committed a robbery at the liquor store, and that petitioner had fired a weapon into the air before fleeing. After being informed of petitioner's statement, the uncle gave the police a statement that he had been in the liquor store when petitioner unexpectedly came in and attempted a holdup. The two statements not only differed in significant details, but petitioner's confession was also demonstrably false in a number of respects.

The uncle pleaded guilty and was given a sentence to run concurrently with a sentence he was already serving. He denied the existence of any bargain for his testimony. He testified at

petitioner's trial, admitting that he had made certain parts of the prior statement but claiming that he did so under duress, and denying that he had even made other parts of his recorded statement. Also testifying at trial was petitioner's mother, who had given a somewhat ambiguous prior statement to the police. The statement could be read as saying that petitioner had told her he had committed the crime; at trial, she flatly denied that her son had confessed to her that he had shot anyone.

Prior to trial, petitioner sought and was given an opportunity to challenge the voluntariness of his confession. In that proceeding, he presented evidence concerning the circumstances of his interrogation. The trial court ruled that the confession would be admissible. Because of this, the trial court overruled petitioner's request to present to the jury evidence concerning the circumstances surrounding the taking of the statement. Petitioner took the evidence in question by avowal.

The trial court excluded evidence showing that petitioner, who was sixteen at the time of the interrogation, was questioned for almost two hours in a small windowless room with several police officers present and without any family members or social workers present. The trial court did, however, permit evidence showing that the confession included statements that were demonstrably untrue, including the claimed time of the robbery; petitioner's claim to have used a .357 caliber weapon, when a .32 caliber weapon was actually used; petitioner's claim to have taken money from the store, although none was actually taken; and petitioner's claim that the victim had triggered an alarm resulting in sirens, when the establishment actually had no such alarm system.

Petitioner argues that the test of "harmless error" used by the Kentucky court was constitutionally flawed in that it consisted of an attempt to determine whether the jury's verdict was correct. According to petitioner, this error resulted from the failure of the Kentucky Court to

recognize the differences between the state standard and the federal standard. In its opinion, the Kentucky Court cited Commonwealth v. McIntosh, Ky., 646 S.W.2d 43 (1983), which states Kentucky's "nonprejudicial error" test. Petitioner contends that Kentucky failed to use the correct test, under which error cannot be considered "harmless" if there is a reasonable possibility that the exclusion of the evidence contributed to the guilty verdict. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The Supreme Court pointed out at 476 U.S. at 689, 106 S.Ct. at 2146 that a rational juror would have questioned why Mr. Crane confessed to the crime if he did not commit it; petitioner argues that the exclusion of the evidence concerning the circumstances surrounding the confession deprived petitioner of the opportunity to answer that question.

Respondent contends that the Kentucky Court's handling of the matter was proper. Respondent points out that the Kentucky Court recited the standard for which petitioner argues in

this Court:

> The question here is not whether the jury reached the right result regardless of the error, but whether there is a reasonable possibility that the error might have affected the jury's decision.

Crane v. Commonwealth, 726 S.W.2d at 307.

Furthermore, respondent contends that this standard was properly applied to reach a determination of harmless error, since the evidence excluded by the trial court was merely cumulative, and the only details that were not otherwise before the jury concerned the dimensions of the interrogation room, the exact length of time of interrogation, and the movement of police officers in and out of the room.

Respondent points to defense counsel's opening statement, which referred to the circumstances surrounding the confession, including both details that entered into evidence and those that did not. Respondent states that the jurors were free to consider these matters, since they were never admonished not to consider them. While we would not be inclined to agree that lack of admonition could convert opening statements into

evidence, we need not reach the issue in this case, since the trial judge did give an admonition. The judge explained to the jury that evidence consists of the sworn testimony heard from the witness stand [T.E.3], and further specifically admonished the jury as follows:

> The opening statements. . . are not evidence. They re attempts of counsel to tell you that which is to follow-the evidence which they believe will be presented for your consideration.

[T.E. 5]. Indeed, if the appearance of the defense theory and promise of evidence in the opening statement has any significance at all, it must weigh against the respondent, since it could serve to intensify the jury's focus on the very question Mr. Crane contends he was subsequently prohibited from answering.

The Kentucky Supreme Court examined the specific information excluded by the trial court's ruling, and concluded as follows:

> In view of the incriminatory testimony of appellant's uncle and mother, it is inconceivable to us that the jury would have reached

> any other result in this case had they had the additional testimony concerning the exact length of time appellant was questioned; the exact size of the office where the questioning took place; that none of his family was present, although efforts were made to secure their presence; that appellant was provided with soft drinks, etc. was questioned in a conversational tone; and treated well by the officers. It is our view that beyond a reasonable doubt there is no reasonable possibility the verdict of the jury would have been different had the erroneous exclusion of evidence not occurred.

Crane v. Commonwealth, supra, at 307.

Respectfully, this Court disagrees. There is no question that the evidence most valuable to the prosecution was the confession of the petitioner. All other pieces of evidence against petitioner were insufficiently substantial to stand alone, whether because of ambiguity or questionable credibility. Only with the supporting framework of Mr. Crane's confession could these other components be successfully utilized. It necessarily follows that any circumstances that could cast doubt on the accuracy of Mr. Crane's statement could affect the outcome of the case.

The burden is on the Commonwealth to demonstrate beyond a reasonable doubt that the exclusion did not contribute to the guilty verdict. Chapman v. California, supra. We are not prepared to say that the prosecution can never carry its burden by pointing to an overwhelming weight of unrelated evidence. In this case, however, where the excluded avowal testimony was offered in order to cast doubt on the credibility of the linchpin of the case, the Commonwealth can carry its burden only by showing that the evidence was otherwise available to the jury. For two reasons, we do not believe this to be the case.

First, as pointed out by Justice Leibson in his dissent to the opinion of the Kentucky Supreme Court, it is not sufficient for the Commonwealth to show that the information contained in the excluded avowal testimony was otherwise before the jury; the Commonwealth must also show that it was else where presented "in an equally comprehensible form." Crane v. Commonwealth, supra at 308. The information that the Commonwealth

claims was otherwise available to the jury is scattered in fragment pieces through out the proceedings, in some instances available only by inference. This cannot be said to have been available to the jury in a form equally comprehensible to that offered by petitioner.

Second, jurors do not base their determinations on the bare data presented to them, but are entitled as well to assess the demeanor of the witnesses who present the information. Detective Branham testified before the jury that he talked to petitioner at 7:50 at the Youth Center. He testified on avowal that he arrived at the Youth Center at approximately 7:00 and began talking with petitioner, and that he took a waiver of rights at 7:45. Detective Burbrink testified on avowal that he first encountered Mr. Crane at 5:52. The jury was entitled to observe the demeanor of the officers who described these and other circumstances of the interrogation they conducted. We cannot say that such an observation could have had no effect on the jurors' assessment of the credibility of the confession.

Resolving, as we must, all doubt in favor of petitioner, we must conclude that the error in excluding evidence was not harmless beyond a reasonable doubt. An order in conformity has this day entered.

JUDGMENT AND WRIT OF
HABEAS CORPUS

This matter having come before the Court on petitioner's request for a writ under 28 U.S.C. Sec. 2254, and the Court having entered its memorandum opinion and being advised,

IT IS ORDERED AND ADJUDGED that the application for a writ of habeas corpus is granted conditionally, and respondent shall release petitioner from all custody resulting from the conviction that is the subject of this petition unless the Commonwealth begins proceedings within sixty (60) days of the date of this order to retry petitioner.

This is a final and appealable order and there is no just cause for delay.

NO. 89-5289
UNITED STATES COURT OF APPEALS
For The Sixth Circuit

MAJOR CRANE,
Petitioner-Appellee,

v.

DEWEY SOWDERS, Warden
Respondent-Appellant,
ATTORNEY GENERAL
OF KENTUCKY
Respondent.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF KENTUCKY

Decided and Filed November 14, 1989

Before: MERRITT, Chief Judge; RYAN, Circuit Judge; and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This appeal is before the court on the issue of whether the trial court's exclusion of evidence of the circumstances surrounding the appellee's confession, which was received in evidence, was harmless error. Appellee was convicted of murder. After exhausting state appellate procedures, Appellee sought federal habeas corpus relief. The district court concluded that exclusion of the

evidence was not harmless error and conditionally granted the writ of habeas corpus. The Commonwealth of Kentucky appealed.

Our review indicates that the exclusion of the evidence could have contributed to Crane's conviction. Thus, the error was not harmless beyond a reasonable doubt. Accordingly, we affirm the judgment of the district court.

FACTS

On August 7, 1981, a clerk at the Keg Liquor store in Louisville, Kentucky, was shot to death during an attempted robbery. The police investigation was impeded by a lack of physical evidence at the scene of the crime. However, a week later, Appellee Major Crane, a sixteen-year old boy, was arrested in connection with an unrelated robbery. As the police processed Crane on that charge, he began confessing to some recent unsolved crimes. Crane was transferred to the juvenile detention center for further questioning. Prior to and during questioning, Crane was held in a small windowless room for one hour and forty

minutes with several police officers without the aid of a lawyer, social worker, or family. Crane made a recorded confession that implicated himself and his uncle in the attempted robbery and murder at Keg Liquor. Crane's confession contained several factual errors including the time of the attempted robbery, the existence of an alarm system at the liquor store, and the caliber of the weapon used. Crane also confessed to other recent crimes which later investigation showed that he did not commit.

After his indictment, Crane moved to suppress his confession on the grounds that it was coerced in violation of the fifth and fourteenth amendments. The court denied the motion. At trial, Crane's counsel promised in her opening statement to show that the circumstances surrounding the confession made it unreliable. Before any evidence was presented however, the prosecutor made a motion in limine to exclude any evidence regarding the circumstances of the confession because it would constitute an attack on

the voluntariness of the confession which had already been conclusively determined at the suppression hearing. The trial court's ruling allowed evidence of the inconsistencies in the confession, but barred evidence concerning the length of the detention or the fact that Crane was alone with his interrogators for an extended period. The defense presented the desired testimony by an avowal, a procedure by which excluded evidence is presented outside of the jury's presence and becomes a part of the record for appellate review. The prosecution relied heavily on Crane's confession and prior statements by Crane's mother and uncle denied all or part of their statements. Crane was convicted and sentenced to forty years in prison.

On direct appeal, the Kentucky Supreme Court affirmed his conviction, holding that the exclusion of the evidence was not error because it pertained only to the voluntariness of the confession which had been determined at the suppression hearing. Crane v. Commonwealth, 690 S.W.2d 753, 755 (Ky. 1985). The United States

Supreme Court, however, ruled that excluding of the evidence was constitutional error because it stripped Crane of the power to present a defense by disabling him from "answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" Crane v. Kentucky, 476 U.S. 683, 689 (1986). The Court remanded the case for consideration of whether the error was harmless.

On remand, the Kentucky Supreme Court held the error to be harmless beyond a reasonable doubt. Crane v. Commonwealth, 726 S.W.2d 302, 307 (Ky. 1987). The court reasoned that the jury heard portions of the excluded evidence from other sources during the trial. This, in addition to the incriminatory statements made by Crane's mother and uncle, caused the court to conclude "that beyond a reasonable doubt there is no reasonable possibility the verdict of the jury would have been different had the erroneous exclusion of evidence not occurred." Id. at 307.

Crane petitioned the district court for habeas corpus relief. The district court rejected

the view that the jury could derive sufficient information from the defense opening statement or other testimony to make the exclusion of the avowal testimony harmless error. Crane v. Sowders, 708 F.Supp. 163, 166 (W.D. Ky. 1989)(mem.). The court stated that where the excluded testimony was offered to cast doubt on the credibility of the linchpin of the case, the State must show that the evidence was before the jury in a "form equally comprehensible to that offered by the petitioner." Id. at 166. Furthermore, the court noted that the jurors were denied the opportunity to observe the demeanor of the avowal witnesses, and such observation could affect the jurors' assessment of the credibility of the confession. Thus, the district court concluded that the error was not harmless and conditionally granted the writ of habeas corpus. From this judgment, the State appealed.

HARMLESS ERROR ANALYSIS

In Chapman v. California, 386 U.S. 18 (1967), the Supreme Court formulated the harmless

error rule for cases involving federal constitutional error. Declining to find all constitutional errors harmful, the Court nonetheless set a rigorous standard holding that "before a federal constitutional error can be held harmless beyond a reasonable doubt." Id. at 24. Citing an earlier case, the Court stated tat in harmless error analysis, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id. at 23 (citing Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

The Court gave further definition to the harmless error standard for cases involving limitations of cross-examination in Delaware v. Van Arsdall, 475 U.S. 673 (1986). The Court stated:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the important of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on

> material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. at 684.

In its appeal to this court, the State argues that application of the standards in Chapman and Van Arsdall mandates the reversal of the district court's ruling that the exclusion of the evidence was not harmless error.[1] The State reiterates its argument that defense counsel detailed many of the circumstances surrounding the confession in her opening statement and that other details could have been gleaned from the testimony presented to the jury. The State urges that although the evidence of the circumstances

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1. The State also attempts to distinguish between cases of collateral attack and direct appeal. Other than the comity and federalism customary to federal court review of state court judgments, case law clearly holds that shifting the burden of proof to habeas petitioners has no effect on the standard of review. Accordingly, the argument warrants no further inquiry.

surrounding the confession was not present3d to the jury in the form desired by the defense, the jury had sufficient evidence to consider the credibility of the confession. The State concludes that the avowal evidence would have been merely cumulative, and thus, the error was harmless. We cannot agree.

In making a harmless error determination, we look at all the evidence. United States v. Crowder, 719 F.2d 166, 173 (6th Cir. 1983), cert. denied 466 U.S. 974 (1984)(in light of all evidence, erroneous instruction was harmless and did not contribute to verdict); United States v. Butler, 618 F.2d 411, 421 (6th Cir. 1980), cert. denied sub nom., Buter v. United States, 447 U.S. 929 (1980), cert. denied sub nom., Hyden v. United States, 449 U.S. 1089 (1981)(government's failure to correct misimpression at time made was harmless error in light of all evidence); United States v. Cale, 418 F.2d 897, 899 (6th Cir. 1969), cert. denied, 397 U.S. 1015 (1970)(even if admission of co-defendant's statement was error, it was harmless beyond a reasonable doubt in light of all evidence). In the present case, Crane's confession

was crucial to the State's case. The State conceded this point in oral argument. There was no physical evidence linking Crane to the crime. Aside from Crane's confession, the State's evidence consists of statements of questionable reliability from Crane's mother and uncle. With so little corroborating evidence, a jury might well find it difficult to credit the contested confession of a sixteen-year-old boy who has confessed to crimes he did not commit.

Furthermore, the State's contention that the avowal evidence would have been merely cumulative lacks merit. The State asserts that the defense opening statement detailed the circumstances of the confession for the jury. The concept that opening statements are not evidence is too elemental to deserve discussion. Further, the jury was so instructed. Other fragmented details were strewn throughout the police testimony, but no comprehensive picture of the confession setting was presented to the jury. Considering the importance of Crane's confession to the State's case, the

exclusion of evidence bearing on its credibility violates principles of procedural fairness. As Justice O'Connor observed in the earlier appeal of this case: "[A]n essential component of procedural fairness is an opportunity to be heard. (Citations omitted). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." Crane v. Kentucky, supra, at 690.

Thus, considering this case in light of the factors in Van Arsdall, supra, the noncumulative nature of the excluded evidence and the weakness of the prosecutions' case when considered in light of the evidence of the unreliability of Crane's confession mandate that the error was nor harmless. This in conjunction with the Supreme Court's holding that Crane was deprived of his constitutional right to present a defense clearly indicates there is a reasonable possibility that the exclusion of the evidence

could have contributed to the guilty verdict in violation of the Chapman standard. Thus, we conclude that the error was not harmless beyond a reasonable doubt. Accordingly, we affirm the decision of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5289

MAJOR CRANE,

Petitioner-Appellee,

v.

DEWEY SOWDERS, Warden,

Respondent-Appellant

ATTORNEY GENERAL OF KENTUCKY,

Respondent

Before: MERRITT, Chief Judge; RYAN, Circuit Judge; and PECK, Senior Circuit Judge

J U D G M E N T

ON APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court tht the judgment of the said district court in this case be and the sqme is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

s/Leonard Green
Clerk

A true Copy.

Attest:

186194
Deputy Clerk

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STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

COUNTERSTATEMENT OF THE CASE[1]

On August 7, 1981 at approximately 10:40 p.m., Randall Todd, a clerk at the Keg Liquor Store in Louisville, Kentucky, was found shot to death. (TE Vol. II, 9). The police suspected that he had been shot during the course of a robbery, but found that no money had been taken from the store. (TE IV, 54). An extensive search of the liquor store and the area immediately surrounding it were made but the police were unable to find much physical evidence beyond several fingerprints, a footprint and some tire tracks. (TE II, 12, 31-33). None of this evidence indicated the identity of the person(s) involved. As a result of an autopsy, the police recovered a single .32 caliber bullet from the body of Mr. Todd. (TE II, 5). However, the bullet was damaged to the point that the state firearm's examiner could not determine anything except the caliber of the bullet and the types of pistols from which it could have been fired. (TE II, 62-65). No other physical evidence was discovered and at this point the police had no suspect in the crime. The respondent became involved in the case only after he was arrested on an unrelated charge.

On August 14, 1981, a juvenile named Patrick Holder was arrested in connection with a service station burglary on the previous evening. He named the respondent as an accomplice to the burglary. (TE Supp. 7). Holder and Detective Burbrink went to the scene of the burglary and on their way back to a police substation,

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[1]References to the state court record are made (TR ___). References to the transcript of the suppression hearing are made (TE Supp. ___). References to the state trial transcript are made to volume and page number, e.g. (TE I, ___). References to the certiorari petition are made (Pet. for Cert. ___).

Holder saw the respondent. Burbrink then arrested the respondent on the burglary charge and took him to the police substation. (TE Supp. 7-9).

While completing the paperwork incident to the burglary arrest, Burbrink was sitting at a desk with the respondent and, according to Burbrink, (TE Supp. 10):

> [J]ust out of the clear blue sky, [the respondent] said, "I confess." He said, "I confess". I said, "Confess to what?" He said, "I confess to robbing the hardware store out there on Dixie Highway next to the Convenient." I kind of just looked at him and I really didn't pay him too much mind. He said, "I confess to shooting the police officer." He said, "I shot that police officer out there." He said, "I think I shot him in the face." I said, "What are you talking about?" He said, "Out there off Dixie Highway, I shot that police officer." He said, "Right before that, we robbed them people over at the bowling alley." I said, "Over at Big A?" He said, "Yeah, at Big A."

The police subsequently learned that the respondent was not involved in the shooting (TE Supp. 18-19) and that he was lying about the hardware store robbery. (TE Supp. 14). However, he denied knowing anything about the shooting at the Keg Liquor Store. (TE Supp. 11).

The respondent was taken to the Juvenile Detention Center where the police intended to take a tape recorded statement about the hardware store robbery. He arrived at the Center at about 7:00 p.m. and the statement began at 7:45 p.m. (TE Supp. 13). While the respondent was talking about the purported robbery of the hardware store, he said that the clerk set off an alarm and when that happened, the respondent fired a shot into the air. When

the police informed him that nobody was shot during the robbery of the hardware store, the respondent stated, "No I am talking about the Keg Liquors. That is where I am talking about is at Keg Liquors where that guy got killed." (TE Supp. 14). At that point, the police taped a statement from respondent in which he implicated himself in an attempted robbery of the liquor store and in shooting the clerk. (TE Supp. 14). The resulting confession was introduced as evidence during the trial. (TE II, 14-30).

Many of the statements made by the respondent in the tape recorded interview were contradicted by facts discovered by police during the course of their investigation. The story, as it was told in the statement, was that the respondent and another juvenile saw a robbery occur at the Algonquin Manor Shopping Center. The respondent decided to go home and get his guns in order to commit a robbery. (TE II, 15-16). On the way, he met his uncle, George Howard Williams, who planned a robbery in which Williams would pretend to make a purchase and the respondent would enter the establishment and announce a robbery. (TE II, 16). When the respondent announced the robbery, he said the clerk looked like he had set off an alarm and then "sirens and stuff started going." The respondent then fired a shot into the air and ran out of the store. (TE II, 16-20, 25). He said that before he fired the shot, the clerk gave him between $300 and $400 from the cash register and "a little box under the cash register where you pull the drawer out." The clerk put the money in a brown paper sack which the respondent had given him. (TE II, 16, 20, 22). He said Williams also got some money after the clerk was shot and then

walked away from the scene. (TE II, 17, 22). The respondent said he learned what happened to the clerk from reading the newspaper. (TE II, 19-20).

The respondent said he noticed that a half-pint of liquor was on the counter at the time of the robbery. (TE II, 22-24). He also said the robbery occurred in the afternoon between 4:00 p.m. and 5:00 p.m. (TE II, 24) and that the weapon he used was a .357 caliber pistol. (TE II, 16, 24-29).

However, the police investigation of the case showed that the robbery occurred between 10:30 and 10:40 p.m. on August 7, 1981. No money was taken during the robbery and the liquor store clerk was killed by a .32 caliber bullet rather than a .357 caliber bullet. (TE II, 31-33). There was no alarm or siren system in the store. (TE II, 35). Detectives Burbrink and Branham testified that after the tape recorded statement was concluded, the respondent was taken to the bathroom at which time he disclosed that the weapon he used on the night of the Keg Liquor Store incident was actually a .32 caliber revolver. (TE II, 30, 45-46).

Based on the respondent's statement, the police arrested George Howard Williams.[2] He also gave a tape recorded statement

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[2]Williams received a twenty (20) year sentence in connection with the robbery at the liquor store. (TE III, 47, 51-53).

which was played at trial. (TE IV, 8-19).[3] Williams denied any wrongdoing an said he was purchasing a half-pint of T.W. Samuels whiskey when the respondent, carrying a gun, entered the liquor store and announced a robbery. He said the clerk turned to go into the back of the store when the respondent fired a shot. Williams identified the weapon as a .32 caliber revolver, and said the respondent was 16 years old at the time of the robbery. (TE IV, 9-11, 13, 18). Williams said he left his purchase on the counter when he fled the store and that the respondent got into his [Williams'] car and they drove to Williams' house. (TE IV, 10-11, 16, 18). He denied knowing that the respondent was going to commit the robbery. (TE IV, 15-16, 18].[4]

The police also obtained an out-of-court statement from the respondent's mother, Geraldine Crane. She spoke to Detective Tangel the day after the respondent was arrested but at trial she could not remember what she told the police. (TE IV, 56-67). Tangel testified that Lt. Spellman asked Ms. Crane, "what did [Major Crane] say happened?" According to Tangel, Ms. Crane responded, "Major Crane just said that he robbed, he killed, he shot a man, but he didn't know the man was dead until [the day he

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[3]Williams' statement, being that of a convicted felon, suffers from an inherent credibility impairment. Commonwealth v. Richardson, Ky., 674 S.W.2d 515 (1984). Moreover, Williams was motivated to minimize his culpability, otherwise he would have been charged as the triggerman in the crime.

[4]Williams also said that the respondent arrived at the liquor store in a car driven by A.D. Hardy who apparently drove away after the shooting as Williams left the store. (TE IV, 10-11).

was arrested]". (TE IV, 62). The respondent apparently provided no other details or specific information about the incident.[5]

The respondent did not testify at trial and both Williams and Ms. Crane denied knowing anything about the robbery or the respondent's part in it. (TE III, 15, 43; TE IV, 55). There were no disinterested witnesses to the shooting at the liquor store so the statements of the respondent, his mother and Williams constitute the only direct evidence connecting the respondent with the crime.[6]

Defense counsel filed a pretrial motion to suppress the respondent's confession to the police. (TR 36-39). At a hearing conducted on the motion, evidence was introduced that the petitioner, who was 16 years old at the time of the crime, functioned at the level of a third or fourth grade child. (TE Supp. 36-38). Evidence was also introduced that he confessed to two other crimes, a shooting and a robbery, that he did not commit. (TE Supp. 11, 14, 18-19). Finding that the respondent's confession was made voluntarily, the trial court denied the motion to suppress. (TR 66-67; TE Supp. 73-76).

Before any evidence was presented at trial, the prosecutor moved in limine to prevent introduction of evidence

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[5]Ms. Crane's statement was of little or no probative value because it was vague and not articulate any specific details of the crime. Moreover, the trustworthiness of any statement that the respondent might have made to his mother is in serious doubt because it was shown that he had a propensity to confess to crimes that he had not committed. (TE Supp. 9-10, 14, 18-19).

[6]Patrick Holder was called to testify about what the respondent had told him concerning the robbery. However, Holder did not know when the respondent had spoken to him and did not know the exact incident to which the respondent was referring. (TE II, 59-60).

concerning the taking of the confession. (TE II, 3). He argued that evidence surrounding the circumstances under which the confession was obtained would amount to an attack on the voluntariness of the confession which had been conclusively determined at the suppression hearing. (TE II, 3). Defense counsel responded that the circumstances surrounding the taking of the confession were to be used to challenge the credibility of the confession, not its voluntariness. (TE II, 4). The trial court ruled that defense counsel could not ask specific questions as to the length of time of the interrogation or the fact that the respondent was alone with police officers during the interrogation. (TE II, 4-7).

At trial, the defense was allowed to introduce into evidence certain facts contained within the confession that were not substantiated by the police investigation of the crime. This evidence included: a misdescription of the weapon used in the shooting (TE II, 16, 24-28, 30-31, 36-37); no money was taken from the liquor store (TE II, 16-17, 21-22, 33, 39; TE IV, 53-54); the store had no siren or alarm system (TE II, 16, 35, 39); a significant discrepancy in the time the crime was committed (TE II 24, 31); and "a gun being fired which had not been fired." Crane v. Commonwealth, Ky., 690 S.W.2d 753, 755 (1985). (TE II, 16, 27, 39). The defense also presented evidence that two people saw a white male with blonde hair run from the direction of the liquor store close to the time the police were responding to the scene. The man got into a car and, while driving away, discarded a beer bottle which was retrieved by the police. (TE V, 3-7, 9-12).

The defense did not present testimony at trial concerning the circumstances surrounding procurement of the confession but did preserve that evidence by way of avowal[7] which established that the respondent, who was 16 years old at the time, was kept in a small, windowless 10 x 12 foot room from shortly after 7:00 p.m. until approximately 8:40 p.m. During that time he was alone in the room with several police officers who were conducting the interrogation. (TE Supp. 36-37; TE V, 14-25).

On direct appeal, the Kentucky Supreme Court ruled that excluding evidence of the circumstances under which the respondent's confession was obtained to demonstrate its lack of credibility did not constitute error. Crane v. Commonwealth, Ky., 690 S.W.2d 753 (1985). Recognizing that the exclusion of such evidence violated the right to present a defense under the 6th and 14th Amendments, this Court reversed and remanded the case to the Kentucky Supreme Court to consider whether the error was harmless. Crane v. Kentucky, 476 U.S. 683 (1986).

On remand, the Kentucky Supreme Court, by a four to two margin, found the constitutional error to be harmless beyond a reasonable doubt. Crane v. Commonwealth, Ky., 726 S.W.2d 302 (1987). That Court summarized the excluded evidence as follows:

> The excluded evidence would have added this additional information from Detectives Burbrink and Branham: that [respondent] was arrested at 5:50 p.m. and remained at the police substation until 6:25 p.m., just long enough to type up some

[7] An avowal is a procedure authorized by Kentucky Rule of Criminal Procedure (RCr) 9.52 which allows a party to place in the record evidence deemed inadmissible by the trial court. The evidence is presented outside the presence of the jury and an appellate court is thereby able to review the trial court's ruling excluding the evidence.

> papers; that [respondent] was then transported to the youth bureau in Louisville police headquarters arriving there at 6:38 p.m.; that at 6:59 p.m. he was taken to the detention center where he was met by county officers; that he was questioned in an office approximately 10' x 10' or 12' x 12' square at the detention center until approximately 7:50 p.m., when a recorded statement was taken which ended at 8:40 p.m.; that no member of his family was present, but officers repeatedly attempted to get in contact with his mother and did get in touch with his aunt and requested the family to come to the detention center; that nobody entered the office when [respondent] was questioned except four or five officers; that one of the officers was in and out of the room getting soft drinks and potato chips for [respondent]; that [respondent] was seated during the questioning; that he appeared calm; that the questioning was a conversational-type situation; and that [respondent] was treated well.

Id. 726 S.W.2d at 307.

When his conviction was affirmed a second time by the Kentucky Supreme Court, the respondent filed a petition for a writ of certiorari which was denied. Crane v. Kentucky, 484 U.S. 834 (1987). The respondent then sought federal habeas corpus relief.

Finding that the constitutional error was not harmless beyond a reasonable doubt, the United States District Court for the Western District of Kentucky granted the respondent's petition for a writ of habeas corpus. Crane v. Sowders, 708 F.Supp. 163 (W.D. Ky. 1989). Following an appeal by the Commonwealth of Kentucky, the judgment of the District Court was affirmed in a unanimous opinion by the United States Court of Appeals for the Sixth Circuit on November 14, 1989. Crane v. Sowders, ____ F.2d ____ (6th Cir. 1989).

ARGUMENT

The respondent respectfully submits that certiorari should be denied because the petitioners have failed to establish that this case presents any constitutional issue substantial enough to warrant review by the Court. The harmless error analysis undertaken by the United States District Court for the Western District of Kentucky and United States Court of Appeals for the Sixth Circuit fully complies with all constitutional precedent and does not conflict with any decision of this Court. No issue of national importance is at stake here. The decisions of the lower federal courts are specific to the respondent's case and will affect few, if any, other litigants. The petitioners are simply trying to create a constitutional issue where none exists.

This case involves nothing more than application of the harmless error standard to constitutional errors. The fact of the matter is that the Kentucky Supreme Court, following remand from this Court, applied an erroneous harmless error standard. Citing Commonwealth v. McIntosh, Ky., 646 S.W.2d 43 (1983), the Kentucky Supreme Court stated, "The test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different." Crane v. Commonwealth, Ky., 726 S.W.2d 302, 307 (1987). In McIntosh, the Kentucky Supreme Court held, "The doctrine of nonprejudicial error, sometimes called 'harmless error', is that in determining whether an error is prejudicial, an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." Id. 646 S.W.2d at 45. The

foregoing language from McIntosh and the decision of the Kentucky Supreme Court, following remand from this Court, clearly indicate that the harmless error standard it applied to the respondent's case is a "result-oriented" or an "outcome determinative" test which was specifically condemned in Delaware v. Van Arsdall, 475 U.S. 673, 679-680 (1986). An outcome determinative test requires a showing that the error "more likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). As noted in Van Arsdall, 475 U.S. at 679-680, Chapman v. California, 386 U.S. 18 (1967) enunciates the proper test by which to determine whether constitutional error is harmless. Chapman does not require a finding of a "substantial possibility that the result would have been any different" as do the Kentucky Supreme Court decisions in the case at bar (Crane, 726 S.W.2d at 307) and McIntosh, 646 S.W.2d at 45. Chapman simply requires a showing of a "reasonable possibility that the evidence complained of might have contributed to the conviction. Id. 386 U.S. at 23 quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman, 386 U.S. at 24. "[H]arm is presumed to have flowed from constitutional error; the burden is on the State to demonstrate conclusively to the contrary." Eberhardt v. Bordenkircher, 605 F.2d 275, 279 (6th Cir. 1979).

The Court in Chapman expressed a preference for the standard articulated in Fahy to determine harmless error over an approach which relies on the amount of evidence against the

accused. Chapman, 386 U.S. at 23. The crucial factor in harmless error analysis is "what effect the error had or reasonably may be taken to have had upon the jury's decision." Kotteakos v. United States, 328 U.S. 750, 763-764 (1946). Nothing asserted by the petitioners in their certiorari petition supports the conclusion that the United States District Court and the United States Court of Appeals failed to correctly follow and apply this Court's precedent in determining whether the constitutional error recognized by this Court was harmless beyond a reasonable doubt. Crane v. Kentucky, 476 U.S. at 691. Therefore, the petitioners have not provided this Court with any reason to grant certiorari.

The thrust of the petitioners' argument is that the right to present a defense, guaranteed by the 6th and 14th Amendments, was fully satisfied because defense counsel was able to establish that the respondent's confession was factually inaccurate with much of the evidence discovered by the police during their investigation of this case. What the petitioners ignore is the fact that the state trial court's ruling denied the respondent "a meaningful opportunity to present a complete defense"[8] because that ruling deprived him of a chance to fully challenge the reliability and credibility of the most damaging piece of evidence against him, i.e. his confession. Crane v. Kentucky, 476 U.S. at 691. As this Court recognized, the respondent's "entire defense was that there was no physical evidence to link him to the crime and that, for variety of

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[8] California v. Trombetta, 467 U.S. 479, 485 (1984).

reasons, his earlier admission of guilt was not to be believed." Id. That objective cannot be attained where the respondent was limited to demonstrating the factual inaccuracies of the confession with the evidence discovered by the police. This Court unequivocally recognized the unconstitutional restraints placed on the respondent's right to present a defense. "[S]tripped of the power to describe to the jury the circumstances that prompted his confession, the [respondent] is effectively disabled from answering the one question every rational juror needs answered: if the [respondent] is innocent, why did he previously admit his guilt?" Id. 476 U.S. at 689. The exclusion of the evidence sought to be presented by the defense left the question unanswered and undoubtedly created the possibility that the constitutional error contributed to the respondent's conviction.

The petitioners state that the Sixth Circuit "focused primarily upon the question whether the evidence other than the confession was sufficient to sustain [the respondent's] conviction rather than upon the specific facts [the respondent] proffered for admission which were excluded from the jury by the trial court." (Pet. for Cert. p. 15). Yet, the petitioners made no complaint when the Kentucky Supreme Court undertook precisely the same analysis in determining whether the constitutional error was harmless. See Crane v. Commonwealth, 726 S.W.2d at 307. Thus, it is readily apparent that it is not the analysis of the lower federal courts with which the petitioners take issue but rather the result they reached. Dissatisfaction with the result reached by a lower court is not an appropriate basis upon which to grant

certiorari. There is no doubt that the respondent's confession was the most damaging piece of evidence against him. That fact has been previously acknowledged by this Court (Crane v. Kentucky, 476 U.S. at 691), and was also recognized by the District Court (Crane v. Sowders, 708 F. Supp. at 166) and the Sixth Circuit (Crane v. Sowders, ____ F.2d at ____; Slip Op. at 6). Indeed, the petitioners conceded that point not only in oral argument before the Sixth Circuit (Crane v. Sowders, ____ F.2d at ____; Slip Op. at 6) but also acknowledged in their Sixth Circuit brief that the confession was the "linchpin" of the case. (Brief Filed on Behalf of Dewey Sowders, Respondent-Appellant, 6th Cir. No. 89-5289, p. 15). Yet, the petitioners seem to insist that only limited facts should be considered in determining whether a constitutional error is harmless. Such an argument contravenes the fundamental principle that harmless error is determined by an examination of "the whole record". Delaware v. Van Arsdall, 475 U.S. at 681. It is readily apparent that the harmless error analysis undertaken by the District Court and the Court of Appeals fully complied with the decisions of this Court.

The petitioners complain that the District Court and the Court of Appeals unjustifiably rejected the fact-finding conducted by the Kentucky Supreme Court. (Pet. for Cert. 15-16). Those courts simply undertook, and correctly performed, a determination of whether constitutional error was harmless. Moreover, this argument was never presented to those lower federal courts and should not now be considered by this Court.

The petitioners' reliance on Delaware v. Van Arsdall, supra and Dorsey v. Parke, 872 F.2d 163 (6th Cir. 1989) is misplaced because those cases are factually distguishable from this case. In Dorsey and Van Arsdall, only a partial limitation of the right to cross-examine was imposed on the defense. In contrast, the respondent here was completely barred from cross-examining witnesses and giving a closing argument on the circumstances under which his statement was given to the police. As this Court noted, "at trial, defense counsel sought to introduce testimony about the physical and psychological environment in which the confession was obtained. His objective in so doing was to suggest that the statement was unworthy of belief." Crane v. Kentucky, 476 U.S. at 684. "We do . . . think it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of [that defense] succeeding." Id. at 691. Here, the respondent had no opportunity to present crucial aspects of his defense.

The petitioners conclude that the respondent's right to present a defense was fully satisfied because defense counsel was able, in her opening statement, to make reference to evidence that was ultimately excluded by the trial court's ruling and because defense counsel, during closing argument, discussed the inaccuracies contained in the respondent's confession. (Pet. for Cert., pp. 14-15, 22). The petitioners' argument ignores the fact that opening statements and closing arguments are not evidence (as the trial judge informed the jury, TE I, 5-6). See also Crane v. Kentucky, 476 U.S. at 685. Moreover, the trial court's ruling put

the defense in a completely untenable position because defense counsel did not introduce proof to support the claim that the confession was untrustworthy. The exclusion of evidence so crucial to the defense's theory of the case undoubtedly created a reasonable possibility that the constitutional error contributed to the conviction because the jury was given no reason to question the reliability or credibility of the respondent's confession. The exclusion of that evidence stripped the respondent of the ability to explain why he gave the confession.

The petitioners' argument is, in essence, that if the jury heard the excluded evidence from any source, then there is no constitutional error. Where, as here, evidence favorable to the defense may only be incidentally or tangentially disclosed in the course of presenting proof, it can only be surmised what, if anything, the jury might have inferred from all that was said and done in the courtroom. That anomalous situation hardly squares with the right to present a defense which requires that counsel be allowed to shape, mold and present the evidence in such a way that the jury can apply it to the theory of the defense. This is the essence of the adversarial system which ensures that trial by jury is truly a search for the truth. The right to fully present a defense thus advances the reliability of the verdict and thereby engenders confidence in the fundamental fairness of our legal system.

The right to confront and cross-examine witnesses as well as the right to present a closing argument [Herring v. New York, 422 U.S. 853 (1975)] are essential components of the right

to present a defense. Here, the respondent was prevented from cross-examining police officers about the circumstances under which the confession was obtained and was also denied the opportunity of arguing to the jury that such evidence and the reasonable inferences therefrom supported his theory that the confession was untrustworthy. Although defense counsel was permitted to establish factual inaccuracies contained in the confession, that conveyed only a part of the defense to the jury. Unable to present his entire defense, the respondent was forced to content himself with the hope that the jury would not only construct the remainder of his defense from what it had heard in the courtroom but also draw the correct inferences therefrom. The right to present a defense cannot be relegated to a game of chance in which the defendant must hope that the evidence in support of his case is properly considered by the jury.

In terms of harmless error analysis, the question must be asked, "Is there a reasonable possibility that the exclusion of evidence surrounding the circumstances under which the respondent's confession was obtained might have contributed to his conviction?" That question must be answered affirmatively. The respondent's confession was the most damaging piece of evidence against him. As defense counsel's opening statement indicated, the defense intended to offer proof concerning the circumstances under which the confession was obtained in order to demonstrate its untrustworthiness. The exclusion of that evidence left the jury with the naked fact that the respondent admitted that he committed the crime with which he was charged. The state trial court's

ruling left the respondent without the opportunity to explain or offer evidence as to why he gave that confession. The District Court and the Court of Appeals correctly concluded that the substantial infringement on the respondent's right to present a defense and his right to fully confront and cross-examine witnesses prevented the constitutional error committed in this case from being harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the respondent, Major Crane, by counsel, respectfully urges the Court to deny the Petition for Writ of Certiorari.

*FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 625-3800
COUNSEL FOR RESPONDENT

*Counsel of Record

J. DAVID NIEHAUS
DEPUTY APPELLATE DEFENDER
OF COUNSEL

DANIEL T. GOYETTE
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL